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6                   **UNITED STATES DISTRICT COURT**  
7                   **DISTRICT OF NEVADA**  
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9                   EMERSON LESLIE,

10                  Petitioner,

11                  vs.

12                  D. W. NEVEN, et al.,

13                  Respondents.

Case No. 2:13-cv-01989-APG-VCF

**ORDER**

14  
15                  Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254  
16 (#8), respondents' motion to dismiss (#23), petitioner's opposition (#41), and respondents' reply  
17 (#44). The court finds that petitioner has not exhausted all his grounds for relief, and the court  
18 grants the motion in part.

19                  After a jury trial in state district court, petitioner was convicted of battery causing substantial  
20 bodily harm and assault on an officer. Ex. 17 (#24). The state district court adjudicated petitioner  
21 as a habitual criminal. Petitioner filed a motion to correct an illegal sentence. Ex. 25 (#24). The  
22 state district court denied the motion. Ex. 31 (#25). Petitioner appealed both the judgment of  
23 conviction and the denial of the illegal-sentence motion. The Nevada Supreme Court consolidated  
24 the appeals, and it affirmed the state district court. Ex. 41 (#25).

25                  Petitioner then filed a proper-person post-conviction habeas corpus petition in state district  
26 court. Ex. 47 (#25). The state district court appointed counsel, who filed a supplemental petition.  
27 Ex. 54 (#25). The state district court denied the petition. Ex. 63 (#26). Petitioner appealed.  
28 Petitioner then filed a proper-person motion in the Nevada Supreme Court to discharge his

1 appointed counsel. Ex. 72 (#26). The Nevada Supreme Court granted the motion and treated the  
 2 appeal as if it were a proper-person appeal, reviewing the record on its own without briefing. Ex. 73  
 3 (#27). The Nevada Supreme Court then affirmed the denial of the petition. Ex. 74 (#28).

4 Petitioner then filed in this court his petition for a writ of habeas corpus pursuant to 28  
 5 U.S.C. § 2254 (#8). The court dismissed grounds 4 and 7. Respondents' motion to dismiss  
 6 followed.

7 Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must  
 8 exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a  
 9 petitioner must fairly present that ground to the state's highest court, describing the operative facts  
 10 and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan  
 11 v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459 U.S. 4, 6 (1982).

12 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state  
 13 remedies only if he characterized the claims he raised in state proceedings specifically as federal  
 14 claims. In short, the petitioner must have either referenced specific provisions of the federal  
 15 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.  
 16 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that  
 17 applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158  
 18 (9th Cir. 2003) (*en banc*). “The mere similarity between a claim of state and federal error is  
 19 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,  
 20 such as due process, equal protection, and the right to a fair trial, are insufficient to establish  
 21 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

22 Petitioner has divided his grounds for relief into paragraphs designated by letters.  
 23 Respondents, in their motion to dismiss, have designated individual claims in each ground by  
 24 letters. The court will use petitioner's designations.

25 In ground 1(B), petitioner claims that he received ineffective assistance of trial counsel  
 26 because trial counsel did not subject the prosecution's case to a meaningful test, as required by  
 27 United States v. Cronic, 466 U.S. 648 (1984). In his state habeas corpus petition, petitioner made  
 28 similar claims in ground 1, regarding counsel's activities pre-trial, and ground 3, regarding

1 counsel's activities for sentencing. Petitioner did not make a Cronic claim in his state habeas corpus  
2 petition regarding counsel's activities at trial. This part of ground 1(B) is unexhausted.

3 Next in ground 1(B), petitioner claims that trial counsel provided ineffective assistance  
4 because trial counsel did not advise petitioner about testifying and did not prepare petitioner to  
5 testify. Petitioner raised the same claim in his state habeas corpus petition. Ex. 47 at 9 ll. 4-12  
6 (#25). This part of ground 1(B) is exhausted.

7 In ground 1(F), petitioner claims that trial counsel failed to file motions. Petitioner does not  
8 specify what motions in his federal habeas corpus petition, but he did specify the motions in his  
9 state habeas corpus petition. The parties agree that petitioner claimed in state court that counsel  
10 should have filed a motion to dismiss based on the lack of evidence, a motion to suppress evidence  
11 and identification based upon an illegal search of a hotel room, and a motion to sever the counts.  
12 Petitioner does not argue that this part of ground 1(F) includes any other motions. With that  
13 limitation in mind, this part of ground 1(F) is exhausted.

14 Also in ground 1(F), petitioner alleges that there was a complete breakdown in  
15 communications between him and trial counsel. Respondents argue that this part of ground 1(F) is  
16 unexhausted, and petitioner counters that the actual claim is that trial counsel had a conflict of  
17 interest, which is exhausted. The court concludes that there is no claim that counsel provided  
18 ineffective assistance because of a breakdown in communications. Consequently, when an answer  
19 is necessary, respondents need not answer this part of ground 1(F).

20 Ground 1(G) is a claim of cumulative error of ineffective assistance of counsel. To the  
21 extent that ground 1(B) contains unexhausted claims, ground 1(G) is unexhausted.

22 Ground 2 concerns the adjudication of petitioner as a habitual criminal. Ground 2(A)  
23 contains three parts. First, petitioner claims that trial counsel failed to investigate petitioner's prior  
24 criminal history. Second, petitioner claims that the prosecution sought adjudication of petitioner as  
25 a habitual criminal without providing a judgment of conviction from a California case. Third,  
26 petitioner claims that the trial court relied on materially untrue facts when adjudicating petitioner as  
27 a habitual criminal. In ground 2(B), petitioner claims that the prosecution violated the Due Process  
28 Clause of the Fourteenth Amendment when it did not provide a judgment of conviction in the prior

1 California case, as required by state law. In the argument over this ground, petitioner asserts that  
 2 ground 2(A) does not contain three separate claims, but is a claim of cumulative error for the three  
 3 reasons stated. Petitioner has never presented such a claim to the Nevada Supreme Court, and it is  
 4 unexhausted. Respondents argue that the court should dismiss ground 2(B) because it is a claim of  
 5 a violation of a state law, but the state law in question enhances a sentence. If the prosecution did  
 6 not satisfy all the elements of the habitual-criminal enhancement, then the Due Process Clause was  
 7 violated. See In re Winship, 397 U.S. 358 (1970). The court will not dismiss ground 2(B).

8 Ground 3 is a claim that petitioner is actually innocent of the habitual-criminal enhancement  
 9 because the prosecution did not prove the requisite number of felonies. Respondents argue that  
 10 ground 3 is unexhausted, but petitioner did raise the same claim in ground 5 of his proper-person  
 11 state habeas corpus petition. See Ex. 47 at 14-15 (#25). However, the court agrees with  
 12 respondents that the claim is redundant with ground 2(B), and the court will dismiss ground 3 for  
 13 that reason.

14 Ground 5 is a claim of error when the jury was shown a photograph of petitioner that was a  
 15 booking photograph. Respondents argue correctly that petitioner never presented this on direct  
 16 appeal as a claim that federal law was violated. See Ex. 33 at 12-13 (#25). Petitioner's argument  
 17 that he raised the claim as a violation of federal law in his motion to discharge counsel, petition for  
 18 rehearing, and petition for reconsideration en banc is not persuasive, because these were not  
 19 procedurally correct methods to raise a new ground for relief. "Submitting a new claim to the  
 20 state's highest court in a procedural context in which its merits will not be considered absent special  
 21 circumstances does not constitute fair presentation." Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir.  
 22 1994) (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)). Ground 5 is unexhausted.

23 Ground 6 is a claim that the admission of a videotape showing petitioner beating the victim  
 24 was error because the videotape was not authenticated. Respondents correctly argue that petitioner  
 25 never presented this on direct appeal as a claim that federal law was violated. See Ex. 33 at 15-17  
 26 (#25). Petitioner did cite two decisions of federal courts of appeals Ninth Circuit in his appellate  
 27 brief, United States v. Henderson, 241 F.3d 638 (9th Cir. 2000), and United States v. Jackman, 48  
 28 F.3d 1 (1st Cir. 1995). However, to the extent that those two decisions were relevant to petitioner's

1 case, the courts of appeals acted in their supervisory capacities, reviewing judgments of conviction  
 2 in federal criminal prosecutions, and not ruling on issues of constitutional law. Ground 6 is  
 3 unexhausted.

4 Petitioner has filed a motion for summary judgment (#34). The court denies this motion  
 5 because it has not yet directed respondents to file an answer, and petitioner will need to decide what  
 6 to do with his unexhausted grounds.

7 Petitioner has filed a motion for an order denying the motion to dismiss (#42). This is the  
 8 same document as his opposition (#41). The court denies this motion because it is granting in part  
 9 respondents' motion to dismiss (#23).

10 The petition (#8) is mixed, containing both claims exhausted in state court and claims not  
 11 exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 521-22  
 12 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily dismiss  
 13 the unexhausted part of ground 1(B), part of ground 1(G), ground 2(A), ground 5, and ground 6 and  
 14 proceed with the remaining grounds, he may voluntarily dismiss this action without prejudice while  
 15 he returns to state court to exhaust those unexhausted grounds, or he may move to stay this action  
 16 while he returns to state court to exhaust the unexhausted grounds. If petitioner chooses the second  
 17 option, the court makes no assurances about the timeliness of a subsequently filed federal habeas  
 18 corpus petition. If petitioner chooses the last option, he must show that he has "good cause for his  
 19 failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that  
 20 the petitioner engaged in intentionally dilatory litigation tactics." Rhines v. Weber, 544 U.S. 269,  
 21 278 (2005). If petitioner chooses the last option, he also will need to designate an alternative choice  
 22 in case the court declines to stay the action. Otherwise, the court will dismiss the action.

23 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#23) is **GRANTED** in  
 24 part.

25 IT IS FURTHER ORDERED that ground 3 is **DISMISSED**.

26 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry  
 27 of this order to do one of the following: (1) inform this court in a sworn declaration that he wishes  
 28 to dismiss the unexhausted grounds of his petition (#8), as described above, and proceed only on the

1 remaining grounds for relief, (2) inform this court in a sworn declaration that he wishes to dismiss  
2 his petition (#8) to return to state court to exhaust his state remedies with respect to the claims set  
3 out in the unexhausted grounds of his petition (#8), or (3) move to stay this action while he returns  
4 to state court to exhaust his state remedies with respect to the claims set out in the unexhausted  
5 grounds of his petition (#8). Failure to comply will result in the dismissal of this action.

6 IT IS FURTHER ORDERED that if petitioner elects to dismiss the aforementioned grounds  
7 of his petition (#8) and proceed on the remaining grounds, respondents shall file and serve an  
8 answer or other response to the remaining grounds within forty-five (45) days after petitioner serves  
9 his declaration dismissing those grounds. If respondents file and serve an answer, it shall comply  
10 with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.

11 IT IS FURTHER ORDERED that if respondents file and serve an answer, petitioner shall  
12 have forty-five (45) days from the date on which the answer is served to file and serve a reply.

13 IT IS FURTHER ORDERED that petitioner's motion for summary judgment (#34) is  
14 **DENIED**.

15 IT IS FURTHER ORDERED that petitioner's motion for an order denying the motion to  
16 dismiss (#42) is **DENIED**.

17 DATED: *April 20, 2015*



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20 ANDREW P. GORDON  
United States District Judge

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